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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF SEATTLE,

Respondent,

v.

WAYNE EVANS,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Patrick Oishi, Judge

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(CORRECTED) SUPPLEMENTAL BRIEF OF PETITIONER WAYNE EVANS

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A. ISSUE

Whether the right to bear arms under the state and federal constitutions includes knives carried outside the home, and if so, whether a Seattle ordinance forbidding any person from carrying a fixed-blade knife for the purpose of self-defense violates that right?

B. STATEMENT OF THE CASE

A patrol officer saw a car driven by Wayne Evans at 23rd Avenue and East Union Street in the Central District area of Seattle. 1RP 116-17, 120. The officer stopped Evans for speeding, directed him to exit the vehicle, and asked if he had any weapons. 1RP 120, 128-31, 136-37. Evans said he had a knife in his pocket. 1RP 137. The officer recovered a fixed-blade "kitchen" knife in a plastic sheath and arrested Evans. 1RP 137-38. Evans told the officer that he carried the knife for protection "because he got jumped . . . out in the Central District." 1RP 147.

The City of Seattle charged Evans with violating SMC 12A.14.080(B), which provides "It is unlawful for a person knowingly to . . . Carry concealed or unconcealed on his or her person any dangerous knife, or carry concealed on his or her person any deadly weapon other than a firearm[.]" CP 88. The ordinance defines "dangerous knife" as "any fixed-blade knife and any other knife having a blade more than three and one-half inches (3 1/2") in length." SMC 12A.14.010(C). SMC

12A.14.100 sets forth several exceptions to the prohibition, none of which include carrying a knife for the purpose of self-protection.

The case proceeded to trial, where the court instructed the jury that it needed to find Evans "carried a dangerous knife on his or her person" in order to convict. CP 81. The jury returned a general verdict of guilty. CP 71. The Court of Appeals affirmed the conviction, holding the ordinance did not violate the federal or state constitutional right to bear arms. City of Seattle v. Evans, 182 Wn. App. 188, 190, 327 P.3d 1303, review granted, 339 P.3d 634 (2014). This Court granted review.

C. ARGUMENT

1. THE SEATTLE ORDINANCE PROHIBITING CITIZENS FROM CARRYING KNIVES FOR THE PURPOSE OF SELF-DEFENSE VIOLATES THE RIGHT TO BEAR ARMS UNDER THE FEDERAL AND STATE CONSTITUTIONS.

The heart of the constitutional right to bear arms is the ability of citizens to use weapons for the lawful purpose of self-protection. District of Columbia v. Heller, 554 U.S. 570, 628, 630, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); see also McDonald v. City of Chicago, 561 U.S. 742, 750, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (Second Amendment right is fully applicable to the states). Evans's conviction for violating the Seattle prohibition on fixed-blade knives cannot withstand constitutional scrutiny.

The right to bear arms is not confined to the home. Fixed-blade knives of the kind carried by Evans qualify as bearable arms because historically they are the kind of weapon commonly used by law-abiding citizens in times of confrontation. A complete prohibition on the carrying of a protected class of arms in public for the purpose of self-defense is unconstitutional under any level of heightened scrutiny. Evans's conviction for violating the Seattle ordinance must therefore be reversed.

a. Fixed-Blade Knives Qualify As Bearable Arms Under The Second Amendment And Article I, Section 24.

In City of Seattle v. Montana, a majority of justices in a plurality opinion upheld a constitutional challenge to the Seattle ordinance on the ground that the kind of knives involved (a small paring knife and a filleting knife) did not qualify as arms under article I, section 24 of the Washington Constitution. City of Seattle v. Montana, 129 Wn.2d 583, 599-601, 919 P.2d 1218 (1996) (Alexander, J. concurring, Durham, C.J., concurring). This Court can reconsider its precedent not only when it is incorrect and harmful but also when its legal underpinnings have changed or disappeared altogether, such as when the U.S. Supreme Court provides additional guidance or clarifies the proper analytical approach for a federal issue. W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014).

Such is the case here. Montana was decided before the U.S. Supreme Court in Heller clarified what constitutes a bearable "arm" under the Second Amendment. "Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights." State v. Sieyes, 168 Wn.2d 276, 292, 225 P.3d 995 (2010). The standard for what constitutes a bearable arm under the Second Amendment must therefore be read into article I, section 24.

The lead opinion in Montana, while expressly declining to reach the question of whether ordinary knives qualify as arms under article I, section 24, asserted only "[i]nstruments made on purpose to fight with are called arms." Montana, 129 Wn.2d at 590-91 (quoting State v. Nelson, 38 La. Ann. 942, 946, 58 Am. Rep. 202 (1886)).<sup>1</sup> Heller rejected the notion that only instruments made on purpose to fight with are arms: "The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity." Heller, 554 U.S. at 581. "In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same." Id. at 624-25 (quoting State v. Kessler, 289 Ore. 359, 368, 614 P.2d 94, 98 (1980)).

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<sup>1</sup> The constitutional right to bear arms was not even at issue in Nelson. Nelson interpreted the meaning of the term "dangerous weapon" in the Louisiana statute. Nelson, 38 La. Ann. at 942-46.

Heller further clarified that arms are not limited to a particular design of an instrument: "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." Heller, 554 U.S. at 582. Bearable arms under the Second Amendment encompass the sorts of instruments that were common and could be used for self-defense in the event of confrontation. Id. at 581-84, 627. "Like firearms, a knife can be carried by an individual and used as a weapon. Of course, some knives, like some firearms, are better suited to this purpose than others, but all knives and all firearms can be possessed, carried, and used in case of confrontation." David B. Kopel, Clayton E. Cramer, Joseph Olson, Knives and the Second Amendment, 47 U. Mich. J. of Law Reform 167, 191 (2013).

The lead opinion in Montana cited to other, pre-Heller state cases in which "arms" under their state constitutions did not include weapons allegedly used by the criminal class, such as the bowie knife. Montana, 129 Wn.2d at 590. That approach arguably has some basis in Heller: "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes" and there is a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" Heller, 554 U.S. at 624-25, 627. By no stretch of the imagination could a common fixed-blade knife, such as a kitchen knife, be

considered a "dangerous and unusual weapon." And no court anywhere has ever suggested that kind of cutting instrument is particularly used by the criminal element.

Citing State v. Delgado, 298 Or. 395, 692 P.2d 610 (Or. 1984), Justice Alexander's concurrence in Montana implied only certain kinds of knives — "fighting knives" such as bowie knives — were arms. Montana, 129 Wn.2d at 601 & n.2. That runs counter to the lead opinion's suggestion that knives particularly used by criminals, such as bowie knives, were not arms. At any rate, it is a mistake to read Delgado so narrowly. During the American colonial era, a knife was used in self-defense in addition to being used to obtain or produce food and fashion articles from raw materials. Delgado, 298 Or. at 401. The kinds of knives used in self-defense in the 18th and 19th centuries came in a variety of designs, many of which would qualify as fixed-blade knives under the Seattle ordinance. One such knife was a "dirk," which was a "large all-purpose knife equally useful for meals or battle." Harold L. Peterson, American Knives at 19 (1958).<sup>2</sup> Ordinary fixed-blade knives served multiple purposes during frontier times, one of which was for culinary

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<sup>2</sup> The Connecticut Supreme Court, after historical analysis, recently held dirks constitute arms within the meaning of the Second Amendment. State v. DeCiccio, 315 Conn. 79, \_\_\_ A.3d \_\_\_, 2014 WL 7156774 at \*14-18 (Conn. 2014).

purposes and another was for the purpose of fighting and defending oneself in case of confrontation. Id. at 19, 21, 29, 32, 56, 63-65, 70. Standard kitchen knives were used for a variety of purposes, including defense from Indian raids. Id. at 21.

Evans chose a fixed-blade "kitchen" knife to use in self-defense. Through history to the present day, that kind of knife is a common, convenient, cheap and effective weapon in case of confrontation. It qualifies as a bearable arm under article I, section 24 because it qualifies as such under the Second Amendment.

b. The Right To Bear Arms For Self-Defense Extends Beyond The Home.

Heller did not decide whether the right to bear arms extends beyond the home to the public sphere. Few appellate courts have categorically held there is no right to bear arms in public.<sup>3</sup> Many courts assume the right to bear arms has some application beyond the home or leave open the possibility that it does.<sup>4</sup>

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<sup>3</sup> See, e.g., Williams v. State, 417 Md. 479, 481, 496-99, 10 A.3d 1167 (Md.), cert. denied, 132 S. Ct. 93, 181 L. Ed. 2d 22 (2011); Wooden v. United States, 6 A.3d 833, 840-41 (D.C. 2010) (holding the right does not extend beyond the home under a federal "plain error" analysis).

<sup>4</sup> See, e.g., Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir.), cert. denied, 134 S. Ct. 422 (2013); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 89, 96 (2d Cir. 2012), cert. denied, 133 S. Ct. 1806 (2013); Drake v. Filko, 724 F.3d 426, 431-35 (3d Cir. 2013), cert. denied, 134 S. Ct. 2134 (2014).

Some courts have straightforwardly held the right to bear arms applies outside the home. See, e.g., Peruta v. County of San Diego, 742 F.3d 1144, 1166, 1169, 1172 (9th Cir. 2014); Moore v. Madigan, 702 F.3d 933, 936-42 (7th Cir. 2012). The Ninth Circuit in Peruta conducted an extensive textual and historical analysis in reaching that conclusion. Peruta, 742 F.3d at 1150-66, 1173-75. No other court has come close to doing the same. A textual analysis of the Second Amendment phrase "bear Arms" (in contrast to "keep" arms), the original public understanding of the Second Amendment right expressed by important founding-era legal scholars, nineteenth-century case law, and post-Civil War legislation and commentators show the right to bear arms applies outside the home. Id. at 1151-66.

Further, "[t]he interest in self-protection is as great outside as inside the home." Moore, 702 F.3d at 936. Given the reality of frontier life and danger from hostile Indians, "a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." Id. In the present day, people are vulnerable to attack on a sidewalk in a rough neighborhood. Id. at 937. "One needn't point to statistics to recognize that the prospect of conflict — at least, the sort of conflict for which one would wish to be 'armed and ready' — is just

as menacing (and likely more so) beyond the front porch as it is in the living room." Peruta, 742 F.3d at 1152.

Evans had previously been attacked in the Central District neighborhood of Seattle. 1RP 147. Evans was in that same neighborhood when the officer stopped him and found him armed for self-protection. 1RP 116-17, 120. Evans's interest in self-protection as he went about his affairs in that area was greater than it was in the refuge of his home. The right to bear arms cannot be confined to the home.

The City would have the right to bear arms in effect only when the defendant establishes an affirmative defense of necessity to a criminal charge. Answer to Petition for Review at 5-6. The existence of the right to bear arms has never been tied to the legal defense of necessity. Such a conception is also unrealistic. The affirmative defense of necessity requires the defendant to prove a "present threat of death or serious injury;" there is no necessity to carry a weapon before such threat arises. State v. Jeffrey, 77 Wn. App. 222, 225-27, 889 P.2d 956 (1995). Criminals bent on assaulting or robbing someone in a public place do not typically let their victims know they will be subject to death or serious injury ahead of time, thereby putting would-be victims on notice that they should arm themselves before they leave home. By the time the criminal attacks, it is too late to go back home and retrieve a weapon for self-defense. If a weapon cannot be carried in public, then it is

unavailable as a means to exercise the right to bear arms for self-protection in public.

The Second Amendment broadly guarantees "the individual right to possess and carry weapons *in case of* confrontation." Heller, 554 U.S. at 592 (emphasis added). When that confrontation will occur cannot be predicted. Hence the need to be armed with a weapon before the confrontation — and the need to use the weapon in self-defense — arises.

c. Article I, Section 24 Cannot Provide A Lower Level Of Scrutiny Than The Second Amendment.

This Court in State v. Jorgenson concluded article I, section 24 "should be interpreted separately from the Second Amendment to the federal constitution." State v. Jorgenson, 179 Wn.2d 145, 153, 312 P.3d 960 (2013). According to Jorgenson, the right to bear arms guaranteed by the Washington Constitution is subject to reasonable regulation pursuant to the State's police power. Jorgenson, 179 Wn.2d at 155. Jorgenson thus retained the balancing of interest approach for "presumptively lawful" restrictions, where the public benefit from the regulation is balanced against the degree to which it frustrates the purpose of the constitutional provision. Id. at 155-56.

But the U.S. Supreme Court in Heller rejected the interest balancing approach as incompatible with the Second Amendment because

it devalues the right to bear arms. Heller, 554 U.S. at 634-36; Sieyes, 168 Wn.2d at 295. Article I, section 24 cannot afford less protection than the Second Amendment. Sieyes, 168 Wn.2d at 292. If a law falls within the scope of the right to bear arms, then something more rigorous than an interest balancing approach is needed under article I, section 24.<sup>5</sup>

d. Under Any Form Of Scrutiny, The Ban On Carrying Fixed-Blade Knives For The Purpose Of Self-Defense Violates The Constitutional Right To Bear Arms.

The Court of Appeals upheld the Seattle ordinance because "[i]t does not destroy the right to bear arms in public under the guise of regulating it. This ordinance prohibits carrying a concealed or unconcealed dangerous knife or carrying a concealed deadly weapon. It does not ban all knives, nor does it ban firearms." Evans, 182 Wn. App. at 198. That reasoning fails. Heller struck down the handgun restriction as unconstitutional without regard to whether other kinds of firearms were available. Heller, 554 U.S. at 628-29. The fact that Washington D.C. permitted knives in the home played no role in the analysis. Heller rejected the reasoning relied on by the Court of Appeals: "It is no answer

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<sup>5</sup> Courts addressing Second Amendment challenges to presumptively lawful regulations have applied intermediate scrutiny. See, e.g., United States v. Williams, 616 F.3d 685, 692-93 (7th Cir.) (upholding ban on firearm possession for convicted felons), cert. denied, 131 S. Ct. 805 (2010); United States v. Masciandaro, 638 F.3d 458 (4th Cir.) (upholding ban on carrying or possessing a loaded handgun in a motor vehicle within a "sensitive" area (national park), cert. denied, 132 S. Ct. 756, U.S. (2011).

to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." Id. at 629. A citizen's choice of the weapon used for self-defense is entitled to respect. Id. at 628-29. That other kinds of weapons are available for self-protection does not exonerate a ban on a popular weapon.<sup>6</sup>

In striking down the handgun restriction, Heller emphasized the merits of the handgun as a weapon for self-defense: "There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police." Heller, 554 U.S. at 629. Much the same could be said of a fixed-blade knife: it is easily accessible in case of emergency, it cannot be easily wrestled away by an attacker, it is easy to use regardless of physical strength, and it can be pointed at an attacker with one hand while the other

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<sup>6</sup> See also Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. 2007) ("The District contends that since it only bans one type of firearm, 'residents still have access to hundreds more,' and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted."), aff'd sub nom., District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

hand dials 911 on a cell phone. It is also cheap, making it an especially attractive defensive weapon for the poor and homeless in our society.

The knife is a popular weapon for self-defense.<sup>7</sup> The Seattle ordinance bans an entire class of knives from being carried, concealed or unconcealed, in public for the purpose of self-protection. For that reason, this Court need not choose between strict scrutiny and intermediate scrutiny in assessing the constitutionality of this ordinance. The absolute prohibition on carrying fixed-blade knives for self-defense, like an absolute ban on handguns, "necessarily takes certain policy choices off the table" and cannot be justified under any level of scrutiny. Heller, 554 U.S. at 628-29, 634-35.<sup>8</sup>

But if a traditional level of scrutiny is applied, the Sixth Circuit has held strict scrutiny is appropriate in assessing Second Amendment challenges. Tyler v. Hillsdale County Sheriff's Dep't, \_\_ F.3d \_\_, 2014 WL

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<sup>7</sup> FBI statistics for 2009-2014 show knives are the second most common type of weapon used in justifiable homicides by a private citizen, well behind handguns but ahead of other kinds of firearms and weapons. Available at [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expandedhomicide/expanded\\_homicide\\_data\\_table\\_15\\_justifiable\\_homicide\\_by\\_weapon\\_private\\_citizen\\_2009-2013.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expandedhomicide/expanded_homicide_data_table_15_justifiable_homicide_by_weapon_private_citizen_2009-2013.xls) (last accessed 1/29/15).

<sup>8</sup> The Court in Sieyes declined to analyze a firearm restriction on minors under a level of scrutiny, instead looking to "the Second Amendment's original meaning, the traditional understanding of the right, and the burden imposed on children by upholding the statute." Sieyes, 168 Wn.2d at 295.

7181334 at \*14-17 (6th Cir. 2014). The right to bear arms for the purpose of self-defense is a fundamental right. Sieyes, 168 Wn.2d at 287; McDonald, 561 U.S. 742. Strict scrutiny is presumed when a fundamental right is involved. Tyler, 2014 WL 7181334 at \*15; see also Amunrud v. Board of Appeals, 158 Wn.2d 208, 220, 143 P.3d 571 (2006) ("State interference with a fundamental right is subject to strict scrutiny.").

Various federal appellate courts "originally adapted the levels of scrutiny of Second Amendment jurisprudence by looking to First Amendment doctrine, but that First Amendment doctrine reflects a preference for strict scrutiny more often than for intermediate scrutiny." Tyler, 2014 WL 7181334 at \*15. Further, strict scrutiny is preferable because Justice Breyer's dissent in Heller explicitly advocated a form of interest-balancing intermediate scrutiny based in part on Turner Broadcasting System, Inc. v. FCC (Turner II), 520 U.S. 180, 195-96, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997), but the Heller majority rejected Justice Breyer's Turner Broadcasting-based approach. Id. at 16 (citing Heller, 554 U.S. at 634-35 (majority opinion), 690 (Breyer, J., dissenting)). Finally, "the Heller Court's reasons for explicitly rejecting rational-basis scrutiny apply equally to intermediate scrutiny." Id.

Legislation that infringes a fundamental right is constitutional only if it furthers a compelling state interest and is narrowly drawn to serve

such interest. In re Pers. Restraint of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993). The City has never attempted to show the Seattle ordinance survives strict scrutiny analysis, nor could it prevail if it tried. For one reason, "a regulation flunks the narrow-tailoring requirement by being 'underinclusive' if '[t]he proffered objectives are not pursued with respect to analogous . . . conduct." Tyler, 2014 WL 7181334 at \*19. Firearms are about five times more deadly than knives. United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010), cert. denied, 131 S. Ct. 1674 (2011). Firearms are used in violent crime such as murders, aggravated assaults and robberies at a markedly higher rate than knives. Kopel et al., Knives and the Second Amendment at 182 (citing FBI statistics). Yet the Seattle ordinance permits the carrying of firearms while banning the carrying of fixed-blade knives. SMC 12A.14.080(B). The ordinance is fatally under-inclusive under a strict scrutiny analysis.

The City advocates for intermediate scrutiny. Under intermediate scrutiny, the government must prove a statute is substantially related to an important government interest. State v. Williams, 144 Wn.2d 197, 211, 26 P.3d 890, 898 (2001). "The strongest argument in favor of intermediate scrutiny is that other circuits have adopted it as their test of choice," but intermediate scrutiny has a "shaky foundation in Second Amendment law"

and many courts have applied it reflexively without grappling with the underlying justification for doing so. Tyler, 2014 WL 7181334 at \*12, 18.

The Court of Appeals applied intermediate scrutiny in upholding the Seattle ordinance. Evans, 182 Wn. App. at 196-97, n.28. But more than intermediate scrutiny is required where, as here, the challenge involves the central self-defense component of the right and is made by a "law-abiding, responsible citizen" as in Heller. Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011); United States v. Carter, 669 F.3d 411, 416-17 (4th Cir. 2012).

In any event, the Court of Appeals' application of intermediate scrutiny amounts to no real scrutiny at all. Citing the lead opinion in Montana, the Court of Appeals trumpeted public safety and crime prevention as sufficient government interests to uphold the ordinance. Evans, 182 Wn. App. at 197 (citing Montana, 129 Wn.2d at 592-93). The Court of Appeals' reliance on Montana is misplaced because its lead opinion applied the "reasonable regulation" standard, not intermediate scrutiny. Montana, 129 Wn.2d at 591-94. This is not an appropriate application of intermediate scrutiny because it is nearly identical to the freestanding "interest-balancing inquiry" that the majority explicitly rejected in Heller. Peruta, 742 F.3d at 1176.

The City has never justified the Seattle knife ordinance based on actual evidence, empirical data or its own legislative findings. "[T]he rational basis standard may be satisfied where the 'legislative choice . . . [is] based on rational speculation unsupported by evidence or empirical data.'" DeYoung v. Providence Medical Center, 136 Wn.2d 136, 148, 960 P.2d 919 (1998) (quoting Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc., 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)). But the government must produce actual evidence to show its asserted interest under intermediate scrutiny. "[I]ntermediate scrutiny places the burden of establishing the required fit squarely upon the government." United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010). To discharge its burden, the government must produce empirical data, meaningful evidence or legislative findings to support its asserted interest, rather than just relying upon mere anecdote, supposition and assertion. Carter, 669 F.3d at 418; Heller v. District of Columbia, 670 F.3d 1244, 1259 (D.C. Cir. 2011).

The lead opinion in Montana created a post-hoc justification for the ban without real evidence to back it up. It resorted to New York City council findings on the matter, rather than any finding made by the Seattle city council. Montana, 129 Wn.2d at 592-93.

Further, under intermediate scrutiny, no deference is given when assessing "the fit between the asserted interests and the means chosen to

advance them." Peruta, 742 F.3d at 1177 (quoting Turner II, 520 U.S. at 213). Instead, the government is required to prove that the legislation did not burden the right "substantially more . . . than is necessary to further' [the government's legitimate] interests." Peruta, 742 F.3d at 1177 (quoting Turner II, 520 U.S. at 214). The Seattle ordinance does not meet that standard. Comparison to Jorgenson is instructive.

In that case, the Court recognized a statute substantially related to the State's important interest in restricting potentially dangerous persons from using firearms "because it forbids only persons charged with specific serious offenses from possessing firearms, and only while released on bond or personal recognizance." Jorgenson, 179 Wn.2d at 162. The legislature's attempt to keep guns from potentially dangerous persons while released on bail was justified as applied to Jorgenson because, while released on bond after a judge had found probable cause to believe he had shot someone, Jorgenson was found with two guns in his car by police officers investigating the discharge of a firearm. Id. at 162-63.

The Court acknowledged the statute "substantially impedes a person from exercising the right to self-defense," but deemed some categorical disqualifications to be permissible when applied to persons who have been shown to be untrustworthy with weapons. Id. at 163. The Court thus held "as applied here, the temporary restriction on Jorgenson's

right to bear arms after a trial court judge found probable cause to believe he had shot someone does not violate the Second Amendment." Id.

Consideration of the same factors leads to a different result in Evans's case. First, Seattle's ban on the carrying of fixed-blade knives for the purpose of self-defense is not temporary. It is permanent. Second, unlike Evans's case, Jorgenson did not involve a self-defense issue. The uncontroverted evidence is that Evans carried the knife for the purpose of self-protection after being attacked — the purpose for bearing an arm that lies at the heart of the Second Amendment. 1RP 147. Third, there is no indication that Evans has shown himself to be untrustworthy with knives or any other weapon. The City cannot prove its interest in the knife ban does not burden the right to bear arms for self-protection substantially more than is necessary.

Further, Evans had a knife in his pocket while in the privacy of his vehicle. Evans was in his car, not walking on the street, in a park or anywhere else. The City's asserts an interest in avoiding crime in public areas by banning fixed-blade knives. But carrying a knife in one's car is a step removed from carrying a knife amongst members of the public on the street, where the City's asserted interest would be strongest. The place in which Evans carried his knife further supports his argument that the knife ban, as applied to him, violated his right to bear arms.

A New Mexico appellate court recently held a ban on carrying switchblade knives did not violate the right to bear arms guaranteed by its state constitution under an intermediate scrutiny analysis. State v. Murillo, \_\_P.3d\_\_, 2015 WL 270053 at \*1, 5 (N.M. Ct. App. 2015); cf. Delgado, 298 Or. at 397 (striking down ban on switchblade knives under Oregon constitution). The court reasoned the switchblade statute "effects an unsubstantial burden on the right to keep and bear arms" because it "bans only a small subset of knives, which are themselves a peripheral subset of arms typically used for self-defense or security." Murillo, 2015 WL 270053 at \*3. Unlike regular knives, switchblades are designed for uses that are remote from the core of the right to keep and bear arms: they are used by criminals for criminal purposes. Id. at \*3, 5. "It is, 'by design and use, almost exclusively the weapon of the thug and the delinquent.'" Id. at \*5 (quoting Precise Imports Corp. v. Kelly, 378 F.2d 1014, 1017 (2d Cir. 1967)).

Evans's case presents the counterpoint. The Seattle ordinance banning all fixed-blade knives regardless of length cannot be said to ban only a small subset of knives. And the regular kitchen knife carried by Evans is not a weapon designed for use by criminals. Responsible, law-abiding citizens use this kind of knife. The factors that caused the New Mexico court to uphold the switchblade ban are missing here.

The City fixates on the concealed carry aspect of the Seattle ordinance, but the larger problem is that the Seattle ordinance prohibits both the concealed and the unconcealed carrying of a fixed-blade knife for the purpose of self-defense, and leaves no permit option for either mode of carry. SMC 12A.14.080(B). The Ninth Circuit struck down a San Diego County ban on the concealed and unconcealed carry of a firearm in public. Peruta, 742 F.3d at 1169, 1172. The Second Amendment requires that states permit some form of carry for self-defense outside the home. Id. at 1172. States can prescribe a particular manner of carry, but they cannot ban both concealed and unconcealed carry. Id. The Seattle ordinance does just that in relation to fixed-blade knives.

In People v. Mitchell, a California appellate court applied intermediate scrutiny in rejecting a constitutional challenge to a statute that prohibited the carrying of a concealed dirk or dagger. People v. Mitchell, 209 Cal. App. 4th 1364, 1369, 1374-75, 148 Cal. Rptr. 3d 33 (Cal. Ct. App. 2012), review denied (Jan 23, 2013). The statute at issue, however, allowed unconcealed daggers and dirks to be carried for the purpose of self-defense. Mitchell, 209 Cal. App. 4th at 1375.

The Seattle ordinance, on the other hand, criminalizes both the concealed and unconcealed carrying of a dangerous knife when carried for the purpose of self-defense, there being no exception for it. SMC

12A.14.080(B); SMC 12A.14.100. It did not matter whether Evans chose to carry a concealed knife or an unconcealed fixed-blade knife. Either form of carry is illegal under the Seattle ordinance. Evans was damned if he did and damned if he didn't. He had no legal option to carry the knife.

While it could be argued that a restriction on the carrying of a concealed weapon is a presumptively lawful regulation, Evans's argument does not turn on whether there is a constitutional right to carry a concealed knife in public because the jury did not find Evans guilty of carrying a concealed knife. The "to convict" instruction allowed for conviction without regard to whether he carried the knife in a concealed or unconcealed manner and the jury returned a general verdict. CP 71, 81. Evans's as-applied challenge to the Seattle ordinance must be viewed through the lens of the general "to convict" instruction applied to Evans, which is the law of the case. See State v. France, 180 Wn.2d 809, 814, 329 P.3d 864, 867 (2014) (jury instructions not objected to become the law of the case). Regardless, Jorgenson applied intermediate scrutiny to a presumptively lawful regulation under the Second Amendment. Jorgenson, 179 Wn.2d at 161-63. As shown, the Seattle ordinance banning both concealed and unconcealed carry does not even survive intermediate scrutiny.

e. The Remedy Is Reversal Of The Conviction.

Even if there is no constitutional right to carry concealed weapons (as opposed to unconcealed), Evans's conviction must still be reversed. Again, the jury did not convict Evans of carrying a concealed knife. The "to convict" instruction only required the jury to find "the defendant carried a dangerous knife on his or her person." CP 81. The jury returned a general verdict. CP 71. The jury was never asked to pass on the factual question of whether Evans carried the knife in a concealed or unconcealed manner.

"[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." Griffin v. United States, 502 U.S. 46, 53, 112 S. Ct. 466, 471, 116 L. Ed. 2d 371 (1991). The appellate court is not allowed to make a finding of fact that the jury did not expressly find itself. See State v. MacMaster, 113 Wn.2d 226, 234-35, 778 P.2d 1037 (1989) (rejecting argument that if a verdict is supportable on a prong that did not improperly state the law, then the error did not affect the outcome because "[s]uch reasoning . . . requires substitution of this court's judgment for that of the jury's."); State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001) ("When a defendant is convicted under alternative theories, one acceptable and the other based on an erroneous instruction, this court has not been willing to substitute its judgment for

that of the jury by inferring that the verdict was reached under the correct instruction." ).<sup>9</sup>

D. CONCLUSION

For the reasons stated, Evans requests that this Court hold the Seattle ordinance unconstitutional as applied and reverse the conviction.

DATED this 2<sup>nd</sup> day of February 2015

Respectfully Submitted,

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<sup>9</sup> Even where the jury is explicitly instructed on alternative ways of committing the crime, one of which is unconstitutional, there is a presumption of prejudice and the conviction must be reversed unless the prosecution affirmatively shows the instructional error was harmless beyond a reasonable doubt. Williams, 144 Wn.2d at 213.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF SEATTLE,

Respondent,

v.

WAYNE EVANS,

Petitioner.

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) SUPREME COURT NO. 90608-4  
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3<sup>RD</sup> DAY OF FEBRUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF PETITIONER WAYNE EVANS (W/CORRECTED PAGE 19) TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICHARD GREENE  
SEATTLE CITY ATTORNEY  
P.O. BOX 94667  
SEATTLE, WA 98124

[X] WAYNE EVANS  
17010 12<sup>TH</sup> AVE CTE E  
SPANAWAY, WA 98387

SIGNED IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2014.

X Patrick Mayovsky